

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 77-4081

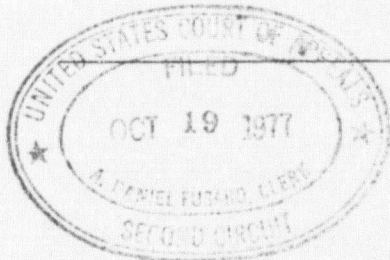
UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

In the Matter of
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
LOCAL 107, INTERNATIONAL LADIES' GARMENTS
WORKERS' UNION, AFL-CIO,
Intervenor,
v.
SOLBORO KNITTING MILLS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT
SOLBORO KNITTING MILLS, INC.



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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
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BRIEF FOR THE RESPONDENT
SOLBORO KNITTING MILLS, INC.

STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their Union activities and sympathies, by actual and implied threats of reprisals for their Union support, by promises of benefits to employees to enlist their aid during the Union campaign and by circulation of a petition of defection from the Union.
2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the

Act by prematurely laying off and thereafter denying reemployment to employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo because of thier support for the Union.

3. Whether the Board's backpay order is proper where it awards backpay to a date prior to that on which the employees would have been recalled, regardless of Union activity.

4. Whether the Board erred in finding, sua sponte, that the Company violated Section 8(a)(5) of the Act, when no such violation had been charged.

5. Whether the Board properly ordered the Company to, upon request, bargain with the Union as the exclusive representative of its employees.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151 et seq.), for enforcement of its order (A.50-51,61-62)^{1/} issued against Solboro Knitting Mills, Inc. on January 7, 1977. The Board's Decision and Order are reported at 227 NLRB No. 89. This Court has jurisdiction over this case, the alleged unfair labor practices having occurred in Oakdale, New York.

STATEMENT OF FACTS

A. Background

Respondent Solboro Knitting Mills, Inc. (herein "the Company", or "Solboro") is a New York corporation engaged in the manufacture of knitted sweaters. Murray Harkavy, president, and Rita Harkavy, secretary-treasurer, managed the Company and supervised its daily operations.

^{1/} "A." references are to pages of the printed appendix.
"BB." references are to pages of the brief of the NLRB to this Court.

During the 1974 fall season, the Company employed approximately thirteen employees to operate its machinery and perform related unskilled tasks. The employer-employee relationship at Solboro is informal. The Secretary-Treasurer of the Company spends her day at the plant, in the shop, personally directing the production force, actually assisting in the work herself, alongside the other employees (e.g., A.356, 388, 471, 920). She has constant contact with her employees regarding their work (A.920); she frequently asks employees, especially the older employees, "What's going on" (A.471, 480, 968).

The Company's operations are seasonal. Business conditions in the apparel industry were depressed in the fall of 1974, and the Company's shipments of orders were already dwindling (A.794-797) when the Company received a telegram on September 30 cancelling a complicated, labor-intensive Sweater-Bee order. Less than one week earlier, the Company was told by its accountant that it had lost \$15,000 during the previous year.

Just a few days later, Union representative Gaspar Sciacca came to Mr. Harkavy claiming that Local 107, ILGWU, represented a majority of his employees. Mrs. Harkavy inquired of Anna Nemec why she had not told her about the Union campaign. Later that day, Mr. Harkavy addressed the employees assembled in the shop.

B. The Speech

He said he understood that some of the people wanted to be represented by the Union. He then spoke of the general economic situation of the Company and the industry, that expenses would rise due to Union benefits, that a major order had been cancelled, that he had just been told by his accountant that the Company had lost \$15,000 for the previous fiscal year, that Hong King competition was on the rise, and finally, that he didn't see how Solboro could survive if all these economic conditions persisted or if there were an additional economic expense. He told his employees that it was their

decision to make, but that he wanted to make them aware of the Company's and the industry's financial condition (A.798-90,845-47).

Mr. Harkavy's recollection was corroborated by every employee who testified about the speech. Carmella Cacoperdo testified that Mr. Harkavy said he might have to close down the plant because he was losing a lot of money (A.300). Joyce Brown testified that, in saying that Solboro might be out of business, Harkavy was referring to a whole economic picture, and furthermore, that he told the employees they should do as they wish (A.532-33, 567-68).

Mrs. O'Connell recalled that Mr. Harkavy described the Union as a possible additional financial burden. He said that if economic conditions get too bad he might have to close the shop. But he did not say that if the girls decided for the Union, he would have to close the shop; to the contrary, he said it was their decision (A.764-765). Although Mr. Harkavy mentioned the possibility of having to close the shop, he did not say it was conditioned on whether or not the Union came in (A.766-67).

Carmen Gonzales, petitioner's witness, "a very impressive witness" (A.37), confirmed that Harkavy spoke about the Company's general economic condition, in which context he said he could not afford the additional expenses which a Union might bring (A.622). She testified that Mr. Harkavy's remarks concerning inability to afford additional expenses and possible closure of the plant were made in reference to the Company's losses in the prior year and the fact that business was slow. She stated that Harkavy at no time threatened her or any other employee about joining the Union, and that he did not say anything to the effect that he did not want employees to be in the Union (A.629-30).

Even Grace Rugolo, the principal Union organizer in the Company (A.4) testified that Mr. Harkavy's speech to the employees concerned the

fact that he had lost \$15,000 for the year of 1974 and that he also had cancellations of orders, so that he did not expect that he could afford additional expenses which a union might bring (A.655). Thus, contrary to the bare unsupported statement at page 16 of the Board's brief, there is no testimony that Mr. Harkavy told the employees that the Company could not afford a union, and the statement about plant closure concerned general economic conditions, not specifically the union.

C. Josephine O'Connell

The Board devotes considerable attention to alleged threats, promises of benefit, and coercive statements of Josephine O'Connell, who on October 5 began circulating a petition among employees repudiating the Union.

Mrs. O'Connell worked like other employees, at different jobs, including floor work, steaming and packing (A.370,685,716). She had no dealings with employees regarding their wages, time off, hiring, firing, or transfers; she had no authority effectively to recommend any of the above such actions; she did not answer questions for employees concerning their work (A.718-720,908). Rather, O'Connell worked on an hourly basis, and was paid time and a half for overtime (A.717). Her rate of pay, \$2.40 an hour (A.717), was even less than the rate for Grace Rugolo, the Union organizer and a recent hire (A.663).

Mrs. O'Connell had no independent authority to issue instructions or directions to employees concerning their work. She could relay instructions to employees, but only those which she received directly from Mrs. Harkavy (A.511,718,906). Even those instructions were limited because O'Connell was not competent to tell employees to do their work (A.977-79).

Mrs. Harkavy specifically told the employees that O'Connell was not a forelady (A.513-515); and contrary to the conclusions of the Board (A.39) and the unsupported assertions of General Counsel (BB.19), the record clearly reveals that the employees did not consider her to be a person of

authority or an agent of management. For example, Margaret Passannante, one of the alleged discriminatees, testified that she never received instructions from Mrs. O'Connell and never had reason to (A.370). Mary White, another witness for the petitioner, testified that she received instructions about her work from no one other than Mrs. Harkavy (A.423). Other employees testified that they knew that Jo O'Connell was not a forelady (A.510,631,642,685).

Finally, employees, including witnesses for the Board, consistently testified that whenever Mrs. O'Connell spoke for Mrs. Harkavy (known in the shop as Mrs. Murray), she would preface her remarks with words such as: "Mrs. Murray wants you to do this", or "Mrs. Murray said for you to do that" (Carmella Cacoperdo, A.525; Donna Moravec, A.616-17; Julia Delfino, A.682). Mrs. O'Connell also testified that whenever she would relay instructions from Mrs. Harkavy, she would preface her remarks to indicate that the instructions came from "Mrs. Murray" (A.717-18,749) because this was the easiest way in which she could get employees to respond to those instructions.

The uncontroverted evidence clearly demonstrates that Mrs. O'Connell, who was neither a supervisor nor agent of the Company, undertook to circulate the petition repudiating the Union without the knowledge of the Company; that those employees who signed the petition did so knowledgeably, without being coerced, and of their own free will (Mrs. O'Connell, A.735-38; Donna Moravec, A.583,602-04; Anna Nemec, A.456,473-76; Cacoperdo, A.492-93, 515); that Mrs. O'Connell typed the letter herself at home without ever discussing it with management; and that management first learned of the letter, with surprise, when O'Connell showed the signed, fait accompli to Mrs. Harkavy (A.737-38,912,973-74).

D. Layoffs

The record is clear that Solboro's business is seasonal; that the season's end was at hand when the Union arrived on the scene; that the Company's knitting machines were already limited to turning out samples and new designs weeks before the Union's demand for recognition, thus creating the production fall-off which justified the layoffs that followed; that the Company had experienced the cancellation of a major in-production order, the first in its experience, on September 29, just days before the Union business agent appeared; that some employees, by the end of September, were being given make-work, and were either finishing up orders for shipment or already working on material that would stay on the shelf and not be shipped out at all; and that October was a very slow month (A.192,459-63,476,556-57, 627,680-84,689,708-10,725-29, 792-802,820-24,835,869-71,922,932-33).

The impact of the cancellation of the Sweater-Bee order (A.192) was severe and sudden. Although "only" 130 to 140 lots were involved, this represented about 65% of the labor in the shop at the time. The testimony of Mr. Harkavy to this effect was uncontradicted and there is no basis for discrediting it. The Sweater-Bee was a detailed, complicated item which required many workers to produce (A.790,791,796).

The resultant loss to the Company was substantial. Since the goods were not to be shipped, respondent had to absorb the full cost of the yarn as well as the full cost of the labor in knitting the goods (A.821-22)^{2/}. The labor cost alone was \$59.80 per lot (A.96); the material cost, at

^{2/} The goods were only valuable to Solboro as completed items, so the sweaters would eventually be completed in the hope that they could be sold, even though the order was cancelled (cf. A.821).

approximately \$34 per lot, brought the cost of the item to \$94 per lot. The cancellation cost the Company \$13,000 of which at least \$7,000 was for labor.

The cancellation followed less than one week after the respondent's accountant reported a \$15,000 loss for the previous fiscal year. At the same time, industry conditions were severely depressed--orders were running behind, stores were cancelling, reorders were not being placed (A.793-95).

Although there was enough work in the shop until the Sweater-Bee cancellation, there was clearly insufficient work thereafter; there were severe losses to be cut; there was an anticipated cash flow problem.

It is uncontroverted that every year, as in 1974, Mrs. Harkavy followed the practice of laying off first the newly hired employees, keeping the employees who have longevity with the Company the longest, until the ultimate close-down for season's end. When an employee with more longevity is let go earlier than another employee, it is because of poor performance (absolutely, or as compared to other employees), or because she can operate fewer pieces of machinery and therefore is less flexible and less valuable to the Company as the number of employees still working diminishes. Mrs. Harkavy makes those determinations based on who can perform the remaining available work with the most versatility (A.477-79,684,729-30,872-75,933). For example, Margaret Passannante was the least senior employee in the shop (A.23). Grace Rugolo was a satisfactory merrow operator, but Gonzales had more seniority (Id.), as did Anna Nemec, who could work every machine in the shop (*infra*, p.). In relatively short order, every last employee was laid off (A.225-235).

E. Failure to Reemploy
Moravec, White, Passannante and Rugolo

By the end of October, Solboro's employee complement had dwindled to 6 and by the end of November, the remaining employees were laid off.

The Board found, and it is not seriously disputed, that Solboro employees are told to "keep in touch" when laid off, for the possibility of reemployment when the new season starts. Each of the alleged discriminatees was told to "keep in touch" when she was laid off (A. 19,20,21,22,46).

The new season began, and several former employees as well as new employees began working in May 1975. There is no evidence that they were "recalled". However, the four alleged discriminatees were not in touch with the Company to request reemployment, like the other employees, in compliance with the employer's policy, until June and July. The Board claims that Solboro refused to reemploy the four named employees because of their Union activities. Operations resumed very slowly (A.158-62).

Solboro offered Moravec a job at the beginning of June, 1975, which she refused because she was enrolled as a full-time student in a business training course (A.47,1035-36). Respondent's Exhibit 9, not printed in the Appendix, is a notice to Solboro from the Department of Labor that Moravec was eligible to receive unemployment benefits, because her refusal to accept employment was with good cause in that she had started on an approved training course prior to the offer of employment.

On July 14, 1975, after declining the offer, Moravec wrote to Solboro asking for reinstatement. It is undisputed that, by that time, the Company had hired someone else to do the separating work she had done before layoff (A.47,1039).

Margaret Passannante was a Singer sewing machine operator (A.18). There was no work for her to do when operations resumed in the Spring. There was uncontradicted and collaborated testimony that, after the autumn 1974 layoff,

Solboro's operations changed completely; a different structure of knitting was performed on a different type of machine--a flat V-bed Jacquard machine. The PAP and circular knitting machines were idle; the Singer machines were idle; the Mauser machines were idle; there was no sewing work to be done in that the sweaters then being manufactured had neither pockets, nor stitching at the bottom, nor borders (A. 1011-12, 1018-21, 1028, 1050-54, 1068, 1069, Rx-8).

Aside from the knitting and labelling machines, only the Merrow was being used (Id., A.1010). This machine was being operated by Anna Nemec and Josie Maltaghati, employees with more seniority and greater flexibility than the alleged discriminatees.^{3/} (A.477-79, 684, 729-30, 872-75, 933, 1005, 1010-12)

Although there was labelling work in the plant, this work was being done competently by Anna Nemec, Josephine O'Connell, and Mrs. Harkavy's daughter (who did such work only till the end of August) (A.1029-30, 1069). Mrs. Nemec and Mrs. O'Connell are more senior than Mrs. Passannante. The labelling machine is the simplest machine in the plant, and it was operated only two or three hours per day (A.1025, 1058-59). However, Mrs. Harkavy clearly testified that if she had additional labelling work beyond that which O'Connell and Nemec were doing, or other work for Passannante, she would not hesitate to reemploy Passannante (A.1030, 1032).

The Company also had no work for Grace Rugolo when she requested reinstatement. The Merrow machine work, such as Ms. Rugolo performed prior to her layoff, was being performed adequately and competently by more senior employees (Nemec and Maltaghati) who had sufficient and more diverse skills;

^{3/} Mrs. Harkavy's response to a question on direct examination (A.1010, 1. 12) was improperly relied on by the Board (A.26 n.39), since it was not only incorrectly transcribed (it should read "not quite") but also qualified with "don't lump them together," which statement was ignored.

there was insufficient work to merit the hiring of another operator.

In addition, Grace Rugolo had abused and insulted Mrs. Harkavy so as to destroy the employment relationship (A.1042-43).^{4/}

Mary White was not recalled because she proved incompetent. White had originally been hired as an experienced Merrow operator (A.883,1022). But she proved to be incompetent on the Merrow (A.883-84,1022-25), as well as incapable of operating other machines not now being used by the Company (e.g., Mauser and Singer)(Id). Her incompetence was corroborated by several witnesses, including those called by the General Counsel (A.468,686-87,695,697, 777). Even if she were competent, she had worked only 26 days for Solboro (A.1067). More senior employees were doing the available work. Although the Company hired many unskilled workers after May of 1975, Mary White had been hired as a skilled machine operator and never did floor work while employed by Solboro (Id.).

F. The Board's Conclusions and Order

The Board's conclusions are adequately described at pages 12-13 of its brief to this Court.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT.

A. Company Is Not Responsible For Threats, Promises, or Interrogations by Josephine O'Connell

The Board erroneously, and contrary to the evidence on the record as a whole, held the Company responsible for allegedly coercive conduct of

^{4/} Mrs. Harkavy's vivid testimony concerning the circumstances, witnesses and words of the conversation the morning of Rugolo's layoff is more credible than Ms. Rugolo's hesitant denial (A.1001). Mrs. Rugolo made several statements about Mrs. Harkavy's qualities as an employer and it is clear she does not think very highly of Mrs. Harkavy (e.g., A.648,662-63). Rugolo herself admits referring to Mrs. Harkavy as a "slave driver" (A.675) and it strains credulity to think that she did not use this phrase or other abusive language in her conversation with Mrs. Harkavy (A.663,996-98,1041-44).

Josephine O'Connell (BB.17-19,21). O'Connell clearly enjoyed no special status or "nexus" with management which would render her conduct attributable to the Company.

The Board concedes that Ms. O'Connell was not a supervisor. The Board cites not an iota of evidence that employees viewed her as a forelady or management representative--the evidence is to the contrary. There is not a shred of evidence that O'Connell spoke for management or that employees thought her statements about union activities originated with management.^{5/} Nowhere in the record does it appear that Mrs. O'Connell invoked Mr. or Mrs. Harkavy when she made any of her allegedly coercive statements (i.e., p.6, supra. E.g., A.523). There is no evidence that she acted at the behest of management. There is no evidence that management knew of her activities and statements. Nor is there any evidence that the employees were led to believe that she was acting on behalf of management in these activities. The Board cites no record evidence to support its conclusion to the contrary, which is mere conjecture.

The Board has frequently refused to hold employers responsible for the anti-union conduct of employees similar to O'Connell.^{6/} Thus, the Company should not be held responsible for circulation of the "deauthorization"

^{5/} The Board's counsel, leading the witness, elicited some vague suggestions from Mrs. O'Connell that Mrs. Harkavy might have said that the shop is "not big enough" to be organized. However, there was no testimony as to when, if ever, this statement was actually made, and the suggestion was that it occurred in the remote past. In any case, such a statement is a permissible noncoercive expression of employer opinion Morgan Products, Inc., 172 NLRB 95, 101 (1968).

^{6/} Stewart & Stevenson Services, Inc., 164 NLRB 741, 742-43 (1967) modified on other groups, 414 F.2d 232, 70 LRRM 2719 (5th Cir., 1969), (employee had no power to hire, fire or recommend change in status of employees, worked alongside other employees, and acted merely as a conduit for the foreman when giving orders); Paoli Chair Co., 213 NLRB 909 (1974), (employee received instructions

petition^{7/} nor for any other conduct of O'Connell. Findings of 8(a)(1) violations stemming from her conduct should be reversed and the corresponding Board order denied enforcement.

(continuation of fn. 6)

from the overall supervisor, relayed them to the other employees in the lumberyard routinely, and guided them in their work, but had no power to hire, fire, discipline or recommend such action, was hourly paid and did not attend meetings of supervisors, nor responsibly direct any of the other employees or possess any supervisory indicia); Rowand Co., 210 NLRB 95 (1974), (employee relayed routine instructions from foreman to laborers as a conduit, did not exercise independent judgment nor have authority to impose or recommend discipline of employees, performed the same type of work and received same as other employees, was neither a supervisor nor agent of the Company); Western Sample Book & Printing Co., 209 NLRB 384 (1974), (employee was not closely allied with management, nor intimately involved in effectuating policies, was merely a senior experienced employee, was considered a supervisor by only one employee, and two of Board's witnesses as well as Company General Manager considered him rank and file); Redwood Construction Co., 192 NLRB 15 (1971), (Company not responsible for anti-union activities to two employees who subsequently advised office manager, an admitted supervisor, who remained silent concerning the incidents: This was not ratification by Company, making it liable for employees' activity. They were not agents of Company within the meaning of the Act. Employees did not hold themselves out as spokesmen for Company. Conduct of two employees was neither authorized nor ratified); NLRB v. Sayers Printing Co., 453 F.2d 810, 79 LRRM 2129 (8th Cir. 1971) (Company could not be charged with responsibility for two employees' actions during union election campaign, which consisted of threatening loss of employment, loss of bonuses, and discharge, where substantial evidence on record as a whole did not support determination that they were supervisors and record was void of evidence that they acted at request or direction of management).

7/ See, e.g., Dietz Forge Co., 173 NLRB 19 (1968), (Employer did not violate Section 8(a)(1) where no evidence that it knew about or authorized circulation of deaffirmation petition or that employees might reasonably believe that it had authorized or condoned the activities of the former supervisor who circulated petition and promised benefits; Even if it did have prior knowledge of the letter, Company would not be responsible); Southern Tours, Inc., 167 NLRB 363 (1967), aff'd on other grounds, 401 F.2d 629, 69 LRRM 2444 (5th Cir. 1968). (Company did not violate Section 8(a)(1), despite other anti-union conduct, where it knew that petition was being circulated and did not interfere; no evidence that employee had been cloaked by the Company with any authority which could render it responsible for his actions, that the petition was circulated during work time or in the presence of supervisors, or that it was given any affirmative support of prompted by the Company in any way in violation of the Act).

B. Mrs. Harkavy Did Not Coercively Interrogate Employees

The record as a whole does not support the Board's finding that Mrs. Harkavy coercively interrogated employees. Questioning employees about union activity is not a per se violation of the Act. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in their exercise of their section 7 rights. Blue Fish Express, Inc., 109 NLRB 591 (1954); Paramount Packaging Corp., 201 NLRB 497 (1973). Questioning employees concerning their union activities is not unlawful, unless it is coercive or accompanied by threats of reprisals.^{8/} The record here rebuts any suggestion of threat or coercion accompanying employer inquiries as to union activity.

The employment relationship is informal, with the employer working in the shop alongside other employees, conversing with them (supra, p.3). And the Board adduced no evidence that in any of the allegedly coercive interviews an employee was urged to reject the union, or that any questions or statements by Harkavy to employees were accompanied by threats of reprisals or force, or promise of benefits (e.g., A.516,630-31). The employees responded freely, openly and without any indication of intimidation, fear or coercion.^{9/}

^{8/} E.g., Acme Products, Inc. v. NLRB, 389 F.2d 104, 67 LRRM 2536 at 2539 (8th Cir. 1968) (NLRB not warranted in finding employer violation of Section 8(a)(1), since no threats of reprisals or promises of reward were made in course of interrogation, nor was anything said or asked which could reasonably be interpreted as hostile to union activity); Utrad Corp. v. NLRB, 54 F.2d 520, 79 LRRM 2080 (7th Cir. 1971). (No violation of Section 8(a)(1) when employer's supervisors asked employees what they thought of the union, even where the employer had a history of hostility to the union and discrimination against the union); NLRB v. Dorn's Transportation Co., 405 F.2d 706, 714, 70 LRRM 2295 (2d Cir. 1969) (an interrogation not coercive in itself "does not become coercive because the employer is guilty of other unfair practices"). NLRB v. McCormick Co., 381 F.2d 88, 65 LRRM 2980 (5th Cir. 1967). (For a non-threatening conversation to violate section 8(a)(1), there must be circumstances which would reasonably induce fear of reprisal).

^{9/} Indeed, some statements by Mrs. Harkavy specifically refute any coercive intent that the Board seeks to attribute to the respondent. For example, Carmen Gonzales, who was called as a witness by the General Counsel, testified that, after inquiring whether Gonzales was a union member, Harkavy stated simply that, "We do not hold it against you girls that you went with the union". (A.639)

Under these circumstances, the questioning of employees by Mrs. Harkavy did not violate the Act. Cases cited, fn. 8 , supra. Also, NLRB v. General Stencils, Inc., 438 F.2d 894, 898-9, 76 LRRM 2288 at 2291 (2d Cir. 1971).

Anna Nemec

Thus, the Board's conclusion, that the questioning of Anna Nemec was "coercive", was reached by rote application of a set of rules without factual explanation and consideration of the circumstances. The Board cites the rule of Struksnes Construction Co., 165 NLRB 1062 (1967), cf. Bourne Co. v. NLRB, 332 F.2d 47, 56 LRRM 2267 (2d Cir. 1964), but fails to apply that rule to the facts of this case. Mrs. Harkavy did not violate Section 8(a)(1) by asking Mrs. Nemec why she had not told her about the union earlier. Cf. Collavino Brothers Constr. Co., Inc., 222 NLRB 889, 890 (1976) (no violation to chide employee for failing to bring grievance to employer's attention instead of going to union). And the "interrogation" of Nemec failed to meet at least four of the five Bourne standards: (a) respondent has no history of anti-union hostility and discrimination prior to the so-called "interrogation" of Anna Nemec; (b) there is no evidence that Mrs. Harkavy was seeking information on which to base taking action against individual employees; (A.453-456, 472-480, 908-909, 968); (c) the employer representative who did the questioning worked on the machines alongside the employees each day^{10/}; (d) the truthfulness of the reply indicates there was no evidence that the interrogation actually inspired fear (A.453-56)^{11/}.

^{10/} "A man working in overalls alongside the other employees is hardly what Bourne meant as being 'high...in the company hierachy' even though he was the highest the workers saw." NLRB v. General Stencils, Inc., supra, 438 F.2d at 899, 76 LRRM at 2291. (Company's Secretary and General Manager.)

^{11/} The Board suggested (A.36,n.53) that even if Nemec were not frightened, other employees might be. However, the inquiry which was found to violate section 8(a)(1) was not addressed to the other employees, but only to Nemec, and there was no evidence offered to show that any other employee was in fact intimidated due to this inquiry of Mrs. Harkavy to Mrs. Nemec.

The Board's conclusion ignores the record evidence of the longstanding relationship between Anna Nemec and Mrs. Harkavy, as well as the informality in the shop. (Supra, p. 3 , A.448,872-3). It is, at best, unclear who initiated the discussion about union activities (compare, e.g., A.909 to A.454). The questions were limited, unaccompanied by coercive or threatening statements as well as uncoercive in effect (A.472). They were clearly permitted under the standards of Acme Products, Inc. v. NLRB, Paramount Packaging Corp., NLRB v. General Stencils, Utrad Corp. v. NLRB, and NLRB v. Dorn's Transportation Co., Inc., supra; cf. NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 479-80 , 91 LRRM 2682, 2693 (2d Cir. 1976).

2. Andrew Zimmerman

Absolutely unfounded on the record as a whole is the Board's conclusion (A.18,39) that Mrs. Harkavy's conversation with Andrew Zimmerman violated the Act. Since the General Council did not allege, charge, or seek to prove that this conversation violated the Act, there is little enough evidence in the record. But the Board reaches its astonishing conclusion by simply ignoring most of what there is. (Compare, A.18 to A.970).

The record reveals that it was Zimmerman who interrogated Mrs. Harkavy about the Union not the other way around. And it was Zimmerman who volunteered information about a visit from the Union business agent; Mrs. Harkavy did not solicit this information. Indeed, only after Zimmerman had disclosed his apparent interest in the union did Mrs. Harkavy expressed her mere surprise about Zimmerman's sudden reversal in attitude, which he had openly disclosed to her. (A.970).

There is no evidence that Mrs. Harkavy's rhetorical question was meant or interpreted as coercive or a threat; there is no evidence that it was accompanied by a threat; nor what it was asked in an "atmosphere of unnatural formality" such as the boss' office. In short, the evidence is

legally insufficient to support a claimed 8(a)(1) violation.^{12/}

C. The Harkavys Did Not Threaten Employees In Violation
of Section 8(a)(1).

1. Mrs. Harkavy's Statement, "I see you girls don't want your jobs,"
Did Not Violate Section 8(a)(1).

The record does not support the Board's conclusions that this statement was accompanied by a reference to the union and therefore was a direct threat of reprisal. The testimony of the sole witness who was examined about this incident belies such an inference.

On direct examination, Carmella Cacoperdo had testified that Mrs. Harkavy had once made the statement to the work force at their work stations, "You girls want the Union?"^{13/} But she also candidly denied that Mrs. Harkavy made any other statement at that time (A.500, line 5, to A.501, line 5). Counsel for the General Counsel finally elicited that Mrs. Harkavy had, at some time, said, "I guess you girls don't want your jobs." (A.501, lines 10-12), but his witness was thoroughly confused as to when that occurred (A.501, lines 12-25), before she was badgered into testifying as he wished.

On cross-examination, Mrs. Cacoperdo clarified her testimony, repeating what she had originally and candidly said: She twice denied that there was any reference to the union in Mrs. Harkavy's statement to the employees about their jobs (A.516). Thus, there is nothing in the record revealing when this

^{12/} NLRB v. General Stencils, Inc., supra; e.g., Stouffer Restaurant & Inn Corp., 210 NLRB 336, enf'd, F.2d , 90 LRRM 2890 (5th Cir. 1974); Larand Leisures, 213 NLRB 197, 206 (1974), enf'd on other grounds, 523 F.2d 814, 90 LRRM 2631 (5th Cir. 1975); NLRB v. Associated Dry Goods Corp., 209 F.2d 593, 595, 33 LRRM 2338, 2339 (2d Cir. 1954). Respondent does not have the burden of proving the statement non-coercive; the burden was on the General Counsel to prove statements were coercive. Farmers' Cooperative Compress, 194 NLRB 85, at 86 (1971).

^{13/} Which, is not a violation in the absence of accompanying threat, promise, etc., supra, p.14.

statement was made, nor that it was intended or perceived as a threat by anyone except General Counsel. Unaccompanied by threats, promises, or any reference to the Union, this statement should not be the basis for finding a company's violation of section 8(a)(1). (Supra, p.14).

2. Mr. Harkavy's Speech Contained No Threat of Reprisal for Union Activities.

The Board should not be allowed to find a section 8(a)(1) violation by mere recitation of a formula that says an employer who goes too close to the brink takes the risk that he will be misunderstood (A.37-38), disregarding the testimony as to what was said.

Given Solboro's economic condition, Harkavy's October 4, 1974 remarks (supra, pp.3-5), were not a threat, in violation of section 8(a)(1), but an expression of opinion, protected by section 8(c) of the Act, based on demonstrable facts as to the economic consequences which might reasonably follow from unionization due to circumstances beyond his control.^{14/}

The problems of business losses, foreign competition (A.789) and a depressed industry were not questioned. It is also unrefuted that the Sweater-Bee order, which represented approximately 65% of the labor in the shop at the time, was cancelled (A.790,814) and that the Company received notice of cancellation only a few days prior to the Union's appearance. Payroll records (RX-7) show that no one was working at the time of the hearing (February 1975) and the Company's records also indicate that no orders had been received by the Company.

In B.F. Goodrich Footwear Company, 201 NLRB 353, 353-354 (1973), the employer did not violate section 8(a)(1) of the Act when a supervisor stated that the Company would very likely have to close down if the Union were voted

^{14/} E.g., NLRB v. River Togs, Inc., 382 F.2d 198, 201, 65 LRRM 2987, 2989 (2d Cir. 1967), rev'g in part, 160 NLRB 58 (1966); NLRB v. Gissel Packing Co., 395 US 575 (1969).

in because they couldn't afford a union, since the union would want higher wages. Those remarks were made in the context of a discussion of the economics of the footwear industry, including the fact that it was highly competitive and that the Company had not made a profit in several years. "This was not a threat but an opinion based on demonstrable facts as to the economic consequences which might reasonably be expected to result from unionization. As such, it was protected by section 8(c) of the Act."^{15/}

Similarly, reference to the record (A.369,988) reveals that Harkavy did not threaten Margaret Passannante in saying there would be more work for her "when we straighten this out"; the Board's conclusion (BB.17-18;A.39) is fabricated of whole cloth. The Board elicited no testimony from either Ms. Passannante or Mr. Harkavy as to what "this" was. Clearly, "this" may have referred to any of the Company's various business problems. The Board's holding that the statement was a threatened reprisal for union activity is not based on record evidence.

In sum, substantial evidence on the record as a whole does not support the Board's finding that Solboro violated Section 8(a)(1) of the Act, and the Board's order should therefore be denied enforcement. Universal Camera Corp. v. NLRB, 340 US 474 (1951).

^{15/} See also, Westmoreland Kitchen, Inc., 209 NLRB 153, 157 (1974). (Remarks that Company could not afford a union because it would require utilization of employees in a certain way not a threat but an argument as to problems. Southern & Western Lumber Company, 212 NLRB 668, 673 (1974) (no violation to tell employees company could not compete if it had to pay union wages); Birdsall Construction Co., 198 NLRB 163 (1972) (no violation where speech was objective statement of financial problems which company would face in event of unionization followed by prediction that relocation would then be necessary); Press Specialties Mfg. Co., 220 NLRB 361, 362 (1975) (we are small company that could not pay union wages and would instead close: no violation.

II.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTIONS 8(a)(3) and (1) OF THE ACT BY TERMINATING AND THEREAFTER DENYING REEMPLOYMENT TO EMPLOYEES PASSANNANTE, WHITE, MORAVEC AND RUGOLO.

A. The Layoffs

The Board's conclusion that the Company discriminatorily laid off employees because of their union affiliation is based on mere conjecture, doubt and innuendo rather than the record evidence. The government did not even meet its initial burden^{16/} of showing by a preponderance of the evidence that the layoffs constituted anti-union conduct rather than justifiable economic activity.

1. Pace of Layoffs

The purely economic basis for the layoffs, the time they occurred, the order in which they occurred, and the period over which they took place, from first to last, was not shown to be anything other than usual and normal in terms of the Company's history and the seasonal nature of its business, and was entirely consistent with the only added new major factor, namely, the disastrous cancellation of the Sweater-Bee order in late September (A.682,709, 727-29, 752-55, 790-93, 801-02, 820-24, 869-70, 873), a loss of \$13,000 following immediately upon disclosure of a \$15,000 loss the prior year. The Board's comparison with the pace of layoffs in 1972 and 1973 (A.42,43) is specious, where there is no demonstration of such severe and sudden losses, depressed industry conditions, or order cancellations, in those years.

While the Board relies on Mr. Harkavy's concern that the Spuncraft order might not be completed on time, as evidence that the layoffs were too hasty, the

16/ Inland Steel Container Co., 185 NLRB 1 (1970). NLRB v. River Togs, Inc., supra; F.W. Woolworth, 204 NLRB 396, 397-8 (1973) ("mere knowledge of an employees activities and the fact that he may have been a good worker are not enough to support a finding of discrimination.")

Spuncraft order was delivered on a timely basis in spite of the layoffs (A.43, line 19) and without any remaining employee working overtime (RX 7, A.219-235). There is no evidence to suggest, as the Board's theory would require being shown, that the Company cut off its nose to spite its face. Mrs. Harkavy who worked on the floor every day at one operation or another (supra, p. 3) continued that practice, as in past years, after the layoffs began. No one worked overtime, no production fell behind, no orders went unfilled, no production required for completing the remaining orders went undone, no business was turned away. The Harkavys made a good business decision which enabled them to complete orders on time, with minimal expense.

[T]he claim that [the company] should have handled the layoffs differently...is in effect a request for the Examiner and the Board to substitute their judgment for that of management about the necessity, nature and timing of an economic layoff. It is well settled that the Board has no right to do this, in appraising an employer's conduct under the Act. ^{17/}
[Sperti Sun Lamp Division, 162 NLRB 1148, 1155 (1967)]

The mere fortuity that a Union demand for recognition occurred at the same time that a layoff for lack of work would have to occur for legitimate business reasons should not render Solboro's actions any more coercive than if those actions had occurred one month earlier or later.

2. Order of Layoffs.

To establish a discriminatory layoff, the Board must demonstrate that the employee would not have been laid off but for his union activity. Clothing Workers v. NLRB, _____ F.2d _____, 95 LRRM 2821, 2825 (D.C. Cir. 1977).

Taking into consideration the ability of the remaining workers when engaged in the process of winding down during layoffs, even where it results in a less

^{17/} See also, R.B.W. Industrial Plastic Products, 184 NLRB 966, 975 (1970); Tectura, Inc., 221 NLRB 1193, 1203 (1975). Compare, e.g., Consolidated Services, 223 NLRB 895 (1976). Cf. Vacuum Plating Corp., 155 NLRB 820, 821 (1965) (A normal temporary economic layoff no violation of 8(a)(3) though it may violate 8(a)(1) if done in a manner as to make it appear to be in reprisal for union activity.)

senior employee being employed longer, is supportable employer conduct, and not indicative of a discriminatory motive. Filmakers Labs, Inc., 211 NLRB 635 (1974).

The record in this case amply demonstrates that Mrs. Harkavy exercised sound business judgment in deciding whose skills were needed to perform the remaining operations as available work dwindled. (A.477-79,684,729-30,872-75, 933,967-70,1035). She was not required to alter her business judgment, and, for example, give no weight to the poor performance of one employee or the limited machine-operating skills of another in order to make a "more perfect" record to suit the General Counsel's view of the layoff order and timing. White Pine, Inc., 213 NLRB 566 (1974).

There is no evidence that Passannante, White, Moravec and Rugolo were selected for layoff because of employer anti-union motivation. Given their seniority and abilities, they would have been the first laid off in any event. Indeed, had the employer laid off employees in anything other than seniority order, its actions would have been suspect.^{18/} Thus, the Board's attempt to portray the order of layoffs as discriminatory is a perverse twisting of its own normal rules. Since the General Counsel could not possibly show that these employees were selected for layoff because of their support for the union--

^{18/} E.g., Sherwood Ford, Inc., 188 NLRB 131, 138 (1971) (where it was also noted that any layoff would have involved a supporter of the Union. The same is virtually true here if we credit the finding that, by October 4, 9 of 13 employees had signed union cards.) Compare, Lincoln Brassiere Co., Inc., 117 NLRB 1237, 1243 (1957). (Note, also company's failure to show actual liquidation of stock and curtailing of production. Here, respondent's financial woes are undisputed.) Cf. Tectura, Inc., supra, at 1204.

in contrast to the established Company policy of following seniority subject to ability to do remaining work--the Board's 8(a)(3) finding is unsupportable, even if there were demonstrable anti-union animus. Sherwood Ford, Inc., supra; Associated Mills, Inc., 190 NLRB 113, 119 (1971) enf'd on other grounds, ___ F.2d ___, 82 LRRM 3035 (7th Cir. 1973) (layoffs selected on basis of seniority due to regular seasonal decline in business and imminence of shutdown which followed a week later).

Finally, reference to the Administrative Law Judge's decision, adopted by the Board, clearly shows that the Board (A.42-44) improperly placed the burden of proof on respondent. The General Counsel submitted no evidence that other employees would have been more logical for layoff; he would hardly claim that an employer should not have proceeded with layoffs in seniority order; he presented no evidence that the employer's business decision with regard to the pace of layoffs was wrong; "his case consisted rather in holding the employer to a standard, which the Board adopted, of rebutting every possible inference consistent with discrimination." NLRB v. River Togs, Inc., supra, 382 F.2d at ___, 65 LRRM at 2991. [See A.42-44]. The Court should deny enforcement as to the alleged premature layoff of employees in violation of section 8(a)(3).

B. Reemployment

The Board's conclusion that respondent's failed to reemploy Passannante, Rugolo, White and Moravec because of their union activity, in violation of section 8(a)(3) is not supported by substantial evidence on the record as a whole. The record reveals clear reasons for not rehiring each of them, completely unrelated to Union activities.

1. Donna Moravec Was Offered Reemployment

The Board's conclusion with regard to this employee is plainly in error. The offer of reemployment, alone, refutes the alleged refusal by Solboro to rehire Moravec because of union activity. In any case, the company's obligation to recall her and pay back pay should cease as of the date she

enrolled in the approved training course, thereby signifying an intent to abandon her job. NLRB v. Ohio Hoist Mfg. Co., 496 F.2d 14, 86 LRRM 2135 (6th Cir. 1974). The Board draws a negative inference from the mere fact that, after the new separator left Solboro, Respondent did not call on Moravec to fill the opening, despite its own finding that Solboro does not recall laid off employees, but expects them to keep in touch by phone or mail to inquire about job openings (A. 46-7), and despite Moravec's previous declination of a job offer.

The Board's finding would subject Respondent to a continual duty to seek out Moravec forever more, whenever an opening occurs, notwithstanding her rejection of an unconditional offer of reemployment; any failure to seek her out would violate section 8(a)(3). Certainly this is an untenable proposition. In view of the Company's unconditional, uncontradicted and corroborated offer to reemploy Ms. Moravec in June, it could not possibly have violated section 8(a)(3) of the Act by failing to seek her out several weeks later, by which time the job she had refused to accept had been filled. There is no evidence that this failure was motivated by anti-union bias.

2. Margaret Passannante and Mary White

The Board's conclusion that there was sewing work in the shop which Solboro improperly kept from Passannante is not based on any evidence in the record. The General Counsel produced no evidence that such work was available. He called no witnesses to contradict Solboro's evidence. To be sure, he demonstrated that the company placed advertisements for Singer operators^{19/--}

^{19/}The company had a general practice of advertising for Singer operators whether or not needed and often does not specify or verify ad contents. (A. 1015-18, 1077-78, 1082-83). Mrs. Harkavy testified without contradiction that in giving a trade magazine article (A. 236 et seq.) describing Solboro's new operations and mentioning, in passing, that Singer machines "are used" in the

but he did not show that any were hired or employed nor that there was any such work performed in the shop. E.g., R.B. & W. Industrial Products, 184 NLRB 966 at 975.

Given her universally recognized incompetence, *supra*, p.11, no negative inference can be drawn from the Company's refusal to rehire Mary White to the same or a similar position; nor from Mrs. Harkavy's desire not to hurt her previously--and unnecessarily in view of the impending layoffs--by telling her she was incompetent (A. 1027). The Board's conclusion with respect to the failure to rehire White is mere speculation unsupported by evidence in the record.

3. Grace Rugolo

The Company properly exercised discretion in giving the available Merrow work to the more senior employees, Nemec and Maltaghati^{20/} (*supra*, p.10) rather than Rugolo. Filmmakers Labs, Inc., *supra*. The Board introduced no evidence to prove that the Company failed to rehire Rugolo because of her union activities.

There is no support in the record for the Board's conclusion that Mrs.

(continuation of fn. 19)

shop, she was advertising to the trade the type of work which Solboro could do; that despite the article's phraseology, there was in fact no work of any type being performed in the shop when the article was written (A. 1050-53). Again, there is no evidence in the record that Singer work was being performed.

^{20/}The Administrative Law Judge wrote that "the very suggestion that a floor employee [Cacoperdo] could be more competent than one who performed even only 'satisfactorily' [Rugolo] at the 'most complicated and the most intricate machine in our plant' sounds in desperation." (A. 45). But there is no suggestion whatsoever in the record that Cacoperdo was working as a Merrow operator. The record clearly shows that she was doing floor help. (A. 1004-5). Equally erroneous is the conclusion that "of the three currently doing [Merrow] work, only Maltaghati . . . had comparable experience": Cacoperdo does not have comparable experience but was not doing Merrow work (Id.); Nemec was the most senior employee and could perform every operation. (A. 23, 450-51, 1004; see also 1010).

Rugolo's insults were a mere pretext for Solboro's refusal to rehire her. Despite the Board's misgivings to the contrary, we respectfully submit that an employee can destroy the employer-employee relationship by referring to the employer as a "slave driver" where the employer has suffered the actual scars of enslavement (A. 1041-44). Even where an employer has a long record of unfair labor practices and has anti-union animus, its discharge of a known union adherent for so much as calling his foreman a "liar" has been held by the Board to be justified conduct, not in violation of section 8(a)(3). Great Dane Trailers, Inc., 204 NLRB 536 (1973); see also, Chemvet Laboratories, Inc. v. NLRB, 497 F.2d 445, 86 LRRM 2262 (8th Cir. 1974); Rockland Chrysler Plymouth, Inc., 209 NLRB 1045 (1974). A fortiori, the insults described by Mrs. Harkavy justified the Company's refusal to rehire Mrs. Rugolo.

In summary, we respectfully submit that substantial evidence on the record as a whole does not support the Board's contention that respondent failed to rehire Moravec, White, Passannante and Rugolo because of their support for the Union.

III. THE BACKPAY ORDER IS IMPROPER BECAUSE THE BOARD MAJORITY ERRED IN FIXING THE TIME OF RESPONDENT'S 8(a)(3) VIOLATION AT A DATE EARLIER THAN THE EMPLOYEES WOULD HAVE BEEN RECALLED REGARDLESS OF THEIR UNION ACTIVITY

Assuming, arguendo, that Respondent violated section 8(a)(3) of the Act by failing to reemploy Margaret Passannante, Mary White, Donna Moravec, and Grace Rugolo, nevertheless the Board majority erred in overruling the Administrative Law Judge and fixing the starting date of respondent's violation (and thus its back pay liability) at a time prior to the company's receipt of these employees' written requests for reinstatement.

A. Substantial Evidence on the Record as a Whole Does
Not Support the Majority's Conclusion

1. The Employer's Layoff Policy

The Administrative Law Judge and the dissenting members of the Board properly found that back pay liability should run from the date the employees would have been rehired but for union activity, i.e., the date they notified the employer of their desire to return to work (A. 10-12, 49). The majority would find a violation from the date the employer began to rehire personnel, imposing a duty on the employer affirmatively to recall the four alleged discriminatees.

However, it is not disputed that Solboro's long-standing policy is to tell employees, upon layoff, that they are to "keep in touch" (A. 27). The burden of initiating a request for reemployment lies with the laid off employee (A. 27). Since employees must be rehired after layoff, they have neither an expectancy nor an entitlement to recall, unless and until they contact the Employer and request to be rehired.^{21/} F. W. Woolworth, supra, 204 NLRB at 411 (employer did not violate sections 8(a)(1) and (3) of the Act when it refused to reinstate a laid off employee who did not first request recall).^{22/}

Thus, the Board majority erred in finding that the Employer violated the Act by failing to recall the alleged discriminatees during the week ending May 17, 1975. On the contrary, in May 1975 all the employees stood in exactly the same position as if there had been no discriminatory conduct: they were all out of work for lack of work. At that time, all employees, regardless of

^{21/}Moravec, e.g., was recalled in response to a request for reinstatement (A. 1035) (BB. 36, to the contrary, is in error); in any case, the Board should be constrained to dispute its own findings of fact.

^{22/}There are no allegations that the Company's recall policy constitutes a per se violation of the Act. In the absence of such allegations and without litigating the propriety of the Company's policy, the Board would be denying Solboro due process if it were simply to substitute its judgment on a recall policy for the policy selected by the Company. Moreover, since layoff procedures are a term and condition of employment constituting a mandatory subject for bargaining, United States Gypsum Co., 94 NLRB 112, 114 (1951), the formulation of such policy lies within the discretion of the employer, if there is no collective

union activity, had the same rights and obligations: they had to "keep in touch" and call the employer to seek reinstatement. The Board majority, however, would impose on the employer a duty to endow some of these laid off employees with recall rights superior to others.

The majority's position is anomalous in that, had Solboro deviated from its policy of requiring employees to keep in touch by requesting these four to return to work before they were adjudged "discriminatees" (which did not happen until 7 months later), Solboro might have violated section 8(a)(3) of the Act by discriminating in favor of these four; employees not afforded such a privilege might have filed unfair labor practice charges against Solboro.

2. The Seasonal Nature of the Business

The Board majority reaches this unreasonable result by ignoring the seasonal nature of the employer's business and erroneously relying on Carbide Tools Inc., 205 NLRB 318 (1973), enf'd by default judgment, 492 F.2d 795 (6th Cir. 1974), which is distinguishable from the case at bar. In Carbide the Board found that the company's policy of hiring "off the street" was not applicable in the case of discriminatorily laid off employees. But there, the recall rights awarded by the Board were not shown to be superior to the rights of other employees of longstanding stature. Moreover, the Carbide decision was predicated largely on the fact that the employees were not told that their work was temporary, nor were they told to keep in touch with the employer; rather the discriminatees had an expectancy of continuing employment. The Solboro employees, on the other hand, knew of the seasonality of their work, and each was specifically asked to

(continuation of fn. 22)

bargaining representative, or within the province of the bargaining relationship if there is. The Board has no authority to dictate a change in such terms and conditions of employment where they do not violate the Act.

"keep in touch" when laid off, for the possibility of rehire when work became available. Even assuming, arguendo, that the employees were discriminated against near the end of the fall season by premature layoff, they still would have finished out the seasonal work and would then stand on equal footing with the other employees laid off for lack of work, who had to request recall after the slack season ended.

The majority ignores the unique nature of seasonal employment when it analogizes to the employer who wrongfully discharges employees and who must then initiate the reinstatement offer. (A. 56). In the case of the wrongful discharge, the employee would still be working but for the employer's wrongful discrimination. In the case of seasonal employment as at Solboro, this was not so --layoff was a normal business condition. In May 1975 no Solboro employees were on lay off status because the employer discriminated; they were on lay off because there was no work. Work was not interrupted, as in Carbide Tools, because of unfair labor practices. The Board majority erred in ignoring this structural economic reality, and therefore erred in applying Carbide Tools.

The dissenting members of the Board (A. 62-5) aptly cite Temperature Systems Corp., 195 NLRB 1023 (1972) for the proposition that the backpay award should reflect the temporary nature of the employees' employment. (See, also, F.W. Woolworth, *supra*, and Union Boiler Co., 213 NLRB 818, 819 (1974), *enf'd on other grounds*, ___F.2d___, 90 LRRM 3057 (4th Cir. 1975)). Failure to apply the Temperature Systems reasoning results in giving the alleged discriminatees superior recall rights to other employees who are in the same position at the same time.

Clearly, then, Solboro had an obligation to rehire the four discriminatees, if at all, only after they called the Employer and asked to be rehired, just as they were invited to do, just like all the other employees. The Employer's liability for back pay should run, if at all, from the date the employees gave written notice of their desire to be rehired.^{23/}

B. The Remedy Imposed by the NLRB Is Punitive Rather Than Remedial and Therefore Is Improper

It is time-honored policy of this Court and the U.S. Supreme Court that the Board's powers under section 10(c) of the Act are remedial, not punitive. NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938), cert. den., 304 U.S. 576 (1938); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940). This Court has held that the Board's remedial authority is "designed to enable it to restore the status quo as nearly as possible. . . further it may not go." Remington Rand, supra, at 872. Cf. Trinity Valley Iron & Steel Co. v. NLRB, 410 F.2d 1161, 1168 (5th Cir. 1969).

Yet the Board's remedy here goes further than restoring the status quo, by alleviating the four alleged discriminatees of the obligation to request reinstatement, which they would have had were they not discriminatees, and by placing a special burden on the employer, *ex poste facto*^{24/} to have recalled them. Rather than place the four in the same position as if there had been no dis-

^{23/} The suggestion that the four employees might have been coerced or restrained from applying for employment in the next season is belied by the fact that they were specifically asked to do so and the fact that all of them did. The cases cited at BB 37 are inapposite to the proposition quoted, and distinguishable in that here it is proven--not mere conjecture--that had the employees not been laid off for discriminatory reasons they nevertheless would have had to request reinstatement, as did the other employees.

^{24/} The remedy proposed by the Board majority suffers from the due process infirmity of having an *ex poste facto* impact: In May 1975 when Solboro began rehiring employees but the four had not yet requested reinstatement, Solboro had no reason to believe that they were in fact discriminatees, since there had been no such adjudication as yet, and no reason to believe that they were to be treated differently than other employees. Indeed, because of the pending charges, Solboro was on notice specifically not to treat these four any differently from the others since this might be considered further evidence of discriminatory motivation!

Moreover, when the Administrative Law Judge issued his decision seven months later, finding these four employees to be discriminatees, the company still did not know of any reason to have treated them differently than any other employees back in May. Only when the Board issued its decision in January, 1977, 20 months after Solboro had begun to rehire employees, was its liability for back pay deemed to extend to some mystical date in the past when it should have foreseen, contrary to all logic and the Administrative Law Judge's not-yet-issued opinion, that the Board would require it to deviate from its recall policy and take the affirmative step of recalling four particular employees among all those laid off.

crimination, the Board remedy rewards these employees and gives them some special status as of the Spring of 1975, which the non-discriminatees did not have and which they do not need to remedy any alleged premature layoff.^{25/}

Prior to requesting reinstatement, the four were not denied employment because of their union activities, but because (a) there was no work, and then (b) they had failed to do what was expected of every other employee, regardless of union activity (See, A. 63). Assuming, therefore, arguendo, that Solboro did later deny them reemployment in violation of section 8(a)(3) because of their support for the Union, they would be "made whole" if the Board were to award them back pay from the date they requested reinstatement until the date the Company made an unconditional offer of rehire.

Any broader remedy is a windfall to the four alleged discriminatees, who regardless of union activity would not have been recalled prior to seeking reinstatement, and an improper punitive award against the employer which is required to bear the expense of the employees' failure to comply with a reinstatement procedure which was not in itself discriminatory (*supra*, n22), and which they had been invited to use. Since the back pay order must be limited to vindicating the public policy of the statute "by making employees whole for losses suffered on account of an unfair labor practice, " Nathanson v. NLRB, 344 U.S. 25, 27 (1952), this order, which makes the employees more than whole by awarding them pay for losses suffered not as a result of unfair labor practices, does not

^{25/} Assuming, arguendo, that the four employees had been prematurely laid off, that violation is fully remedied by the standard method of requiring the employer to pay back lost wages from the time of the layoff until such time as the employees would have been laid off but for the employer's discriminatory motivation (e.g., A. 49; BB34). Giving the alleged discriminatees special recall rights at the start of the new season bears no reasonable relationship to the premature layoff.

"vindicate public policy" and must be narrowed to conform with the statute's "make whole" authority.

Thus, if not vacated altogether, the backpay remedy ordered by the Board must be modified so as to impose back pay only for the period beginning with the date on which each alleged discriminatee requested a return to work.

IV. THE NLRB ERRED IN FINDING AN 8(a)(5) VIOLATION
WHEN NONE HAD BEEN CHARGED

The Board erred in raising, sua sponte, at the time of its review of the Administrative Law Judge's decision, the allegation that Solboro violated section 8(a)(5) of the Act. The Rules and Regulations of the NLRB, section 102.17, state that a complaint may be amended by the Board, upon motion, at any time prior to the issuance of an order by the Board (emphasis added). In the case at bar, the Board did not comply with its rules and did not give the Company notice of this section 8(a)(5) allegation by properly amending the complaint, and the Company did not have full and fair opportunity to refute this charge. Cf. Fire Alert Co., 223 NLRB 129, 130 (1976).

This is not a procedural technicality. The Board's brief notes that "almost" every element of the 8(a)(5) violation was litigated. The assertion that the remaining element--a proper bargaining demand--was readily established and not in dispute (BB. 43) is egregiously misleading. The Administrative Law Judge specifically noted: (a) the absence of any 8(a)(5) contention, (b) that respondent had asserted the inadequacy of the bargaining demand at the hearing, and (c) that while respondent appeared to abandon this position in its brief, the issue was irrelevant in the absence of any 8(a)(5) contention (A. 49, n. 76). Thus Solboro was in fact denied a full and proper hearing on one major aspect of an 8(a)(5) violation. Respondent did not fully litigate its contention as to the inadequacy of the bargaining demand at the hearing, in its brief to the Adminis-

trative Law Judge, nor in its appeal to the Board, because at no time was that issue relevant to the charges the Company was on notice to defend. The Board errs in blindly following the rule from Trading Port, Inc., 219 NLRB 298 (1975)^{26/} The Board neglects to note that, unlike the case at bar, the original charge in Trading Port DID allege an 8(a)(5) violation.

The policy from Steel-Fab, Inc., 212 NLRB 363 (1974), and White Pine, Inc., supra, at 567^{27/} are closer in point, that the injection of "artificial and superfluous" findings of 8(a)(5) violations are not necessary for a bargaining order under the rule of NLRB v. Gissel Packing Co., supra. Therefore, while the employer vigorously contends, infra, that a Gissel order is not appropriate, the Board's finding on the Gissel question is not a justification for finding an 8(a)(5) violation where none had been charged or litigated. Accord, Elling Halvorson, Inc., 222 NLRB 534, at n. 6 (1976).

Such a violation of the Company's due process rights cannot be squared with the requirements of the Board's rule (§ 102.17) that complaints be amended to notify parties of the charges against them, nor with the requirement that administrative agencies adhere to their own rules. Cf. United Air Lines v. Civil Aeronautics Board, 281 F.2d 53 (D.C. Cir., 1960); Vitarelli v. Seaton, 359 U.S. 535.

V. THE BOARD ERRED IN ORDERING THE COMPANY TO
BARGAIN WITH THE UNION UPON REQUEST

The "key to the issuance of a bargaining order" is a finding that there has been "the commission of serious unfair labor practices that interfere with

^{26/}I.e., that the Board will find a violation of the duty to bargain dating from the time an employer, who is faced with a sustainable claim of majority, rejects a bargaining demand in favor of a course of conduct calculated to destroy the Union's majority and precludes a fair election.

^{27/}Which reflected the status of Board law when the complaint against Solboro was served and the matter tried. Compare, e.g., South Station Liquor Store, Inc., 223 NLRB 1115 (1976).

the election process and tend to preclude the holding of a fair election."

NLRB v. Gissel Packing Co., supra. The evidence on the record as a whole does not support such a finding.

There is no basis in law or fact for holding that the Company committed unfair labor practices on the basis of conduct of employee Josephine O'Connell (supra, pp.11-13). Yet O'Connell's anti-union conduct apparently is the major basis for the Board's finding that the company committed serious unfair labor practices consisting of threats, promises of benefit, soliciting employees to repudiate the union, etc., in violation of section 8(a)(1) (A. 39-41; BB. 7-8, 17-21, 41).

Mr. Harkavy's speech to the employees was permissible conduct (supra, pp.3-5 18-19), protected by § 8(c) of the Act. Mrs. Harkavy's questions of employees were not shown to be coercive (supra, 14-16), and were at worst random, isolated incidents, constituting de minimus conduct. It is also clear that layoffs were necessitated by business conditions, and that the pace and order of layoffs were not shown to be anything other than consistent with sound business judgment in the face of severe economic difficulties. The Board has stated time and again that the employer's conduct must be "sufficiently flagrant" to prevent the conduct of an election in order to warrant a bargaining order. Schrementi Bros., 179 NLRB 853 (1969).

Even if the record is found to support findings of section 8(a)(1) and (3) violations, the Board has not explained how they are sufficiently serious or lingering to interfere with the election process. Thus we respectfully submit that the seasonal nature of Solboro's business, the frequent turnover of employees (A. 29, 193-235)^{28/} and the considerable passage of time since this case arose

^{28/}Blind assertions to the contrary in the Board's brief (BB.) notwithstanding (Compare, e.g. A. 193 to A. 235).

render a bargain order inappropriate, since there is no evidence or explanation from the Board showing why a free untrammelled election could not be held among the present Solboro employees. NLRB v. American Cable Systems, Inc., 427 F.2d 446, 448, 73 LRRM 2913 (5th Cir.), cert. den., 400 U.S. 957 (1970), and dissent of Judge McGree in G.P.D., Inc. v. NLRB, 430 F. 2d 963, 965-66, 74 LRRM 3057, 3059-60 (6th Cir. 1970), cited in NLRB v. General Stencils, Inc., 438 F.2d 894, 905, 76 LRRM 2288, 2296 (2d Cir. 1971). Also, NLRB v. Gibson Products Co., 494 F.2d 762, 36 LRRM 2637 (5th Cir. 1974); Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 83 LRRM 3000 (7th Cir. 1973). It is anomolous for the Board to announce a new policy whereby an eggregious misrepresentation of fact 24 hours before an election does not prevent the holding of a fair election, Shopping Kart Food Market, Inc., 228 NLRB No. 190, 94 LRRM 1705 (1977), but that conduct of Solboro three years ago in a shop with high turnover will prevent a fair election. But see NLRB v. Ship Shape Maintenance Co., 474 F. 2d 434, 81 LRRM 2865 (D.C. Cir. 1972).

In sum, a bargaining order is not appropriate on the evidence in the record as a whole.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the Board's order should be denied enforcement in its entirety.

Respectfully submitted,

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210 Old Country Road
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(516) 742-1470

Martin H. Scher
Bruce R. Millman

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x

NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

-and- :

AFFIDAVIT OF SERVICE

LOCAL 107, INTERNATIONAL LADIES' :

GARMENT WORKERS' UNION, AFL-CIO, :

Docket No. 77-4081

Intervenor, :

-vs- :

SOLBORO KNITTING MILLS, INC., :

Respondent. :

----- x

STATE OF NEW YORK)
COUNTY OF NASSAU) ss:

Elaine Medina, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at Elmont, New York. That on the 19th day of October, 1977, deponent served the within Brief for Respondent SOLBORO KNITTING MILLS, INC. upon:

ELLIOTT MOORE, ESQ.
Deputy Associate General Counsel
Attorney for Petitioner, National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

and upon

MAX ZIMNY, ESQ.
Attorney for Intervenor, Local 107,
International Ladies Garment Workers' Union, AFL-CIO
1710 Broadway
New York, New York 10019

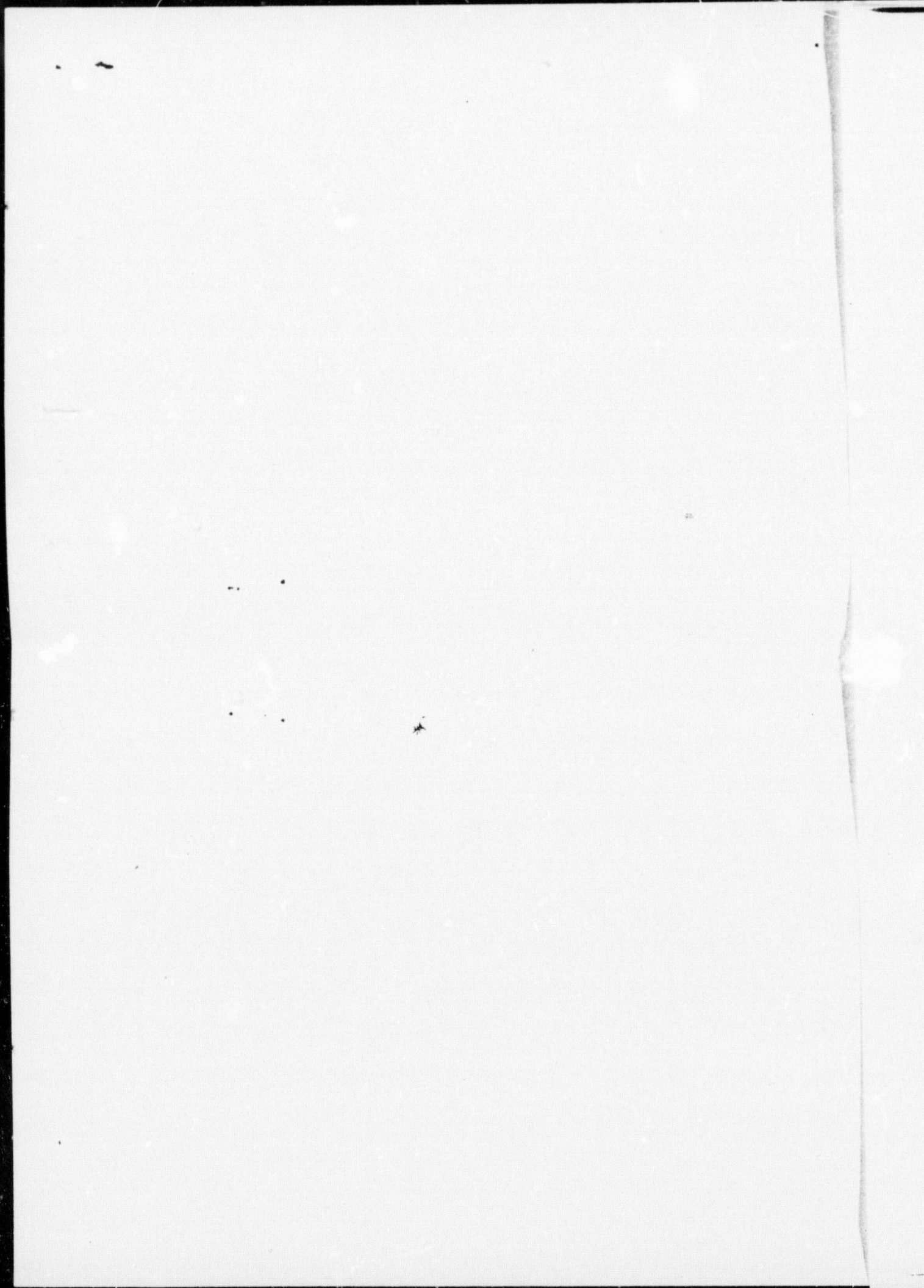
the addresses designated by said attorneys for that purpose by depositing, for each, two true copies of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to before me
this 19th day of October, 1977

Bernice Kamen

BERNICE KAMEN
NOTARY PUBLIC, STATE OF NEW YORK
No. 30715800
Qualified in Nassau County
Commission Expires March 30, 1978

Elaine Medina



CERTIFICATION BY ATTORNEY

STATE OF NEW YORK
COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: _____

VERIFICATION, CORPORATE OR INDIVIDUAL

STATE OF NEW YORK
COUNTY OF

ss.:

, being duly sworn, deposes:

Deponent is _____ the _____ of _____ in the within action;
a corporation,

Deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein alleged upon information and belief, and those matters deponent believes to be true.

The grounds of deponent's belief as to all matters not stated upon deponent's own knowledge are as follows:

Sworn to before me,
this _____ day of _____, 19 _____

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF

} ss.:

STATE OF NEW YORK
COUNTY OF

} ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age

and resides at

That on the _____ day of _____, 19 _____

at No. _____

deponent served the within

upon

the

by delivering a true copy thereof to _____ herein, personally.

Deponent knew the person so served to be the person mentioned and described in said papers as the _____ therein.

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____, 19 _____

deponent served the within

upon

attorney(s) for

in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to before me,
this _____ day of _____, 19 _____

Sworn to before me,
this _____ day of _____, 19 _____

19

NOTICE OF ENTRY

Sir:- Please take notice that the within is a
(certified) true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.

RAINS, POGREBIN & SCHER

Attorneys for

Office and Post Office Address

RAINS BUILDING
210 OLD COUNTRY ROAD
MINEOLA, N. Y. 11501

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a
true copy will be presented for settlement to the
Hon.
one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.

RAINS, POGREBIN & SCHER

Attorneys for

Office and Post Office Address

RAINS BUILDING
210 OLD COUNTRY ROAD
MINEOLA, N. Y. 11501

To

Attorney(s) for

Index No. 77-4081

Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-and-

LOCAL 107, INTERNATIONAL LADIES'
GARMENT WORKERS' UNION, AFL-CIO,

Intervenor,

-VS-

SOLBORO KNITTING MILLS, INC.,
Respondent.

AFFIDAVIT OF SERVICE

RAINS, POGREBIN & SCHER

Attorneys for Respondent

Office and Post Office Address

RAINS BUILDING
210 OLD COUNTRY ROAD
MINEOLA, N. Y. 11501
(516) 742-1470

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

19

Attorney(s) for

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK
COUNTY OF

ss.:

The undersigned, an attorney admitted to
practice in the courts of New York State, hereby
affirms as true under all the penalties of perjury
that affiant is

the attorney(s) of record for

in the within action; that affiant has read the fore-
going

and knows the contents thereof; that the same is
true to affiant's own knowledge, except as to the
matters therein stated to be alleged on information
and belief, and that those matters affiant believes
to be true. Affiant further says that the reason this
affirmation is made by affiant and not by

The grounds of affiant's belief as to all mat-
ters not stated upon affiant's knowledge are as fol-
lows:

Dated

19

HARRY H. RAINS
BERTRAND B. POGREBIN
MARTIN H. SCHER
MONA N. GLANZER
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CABLE ADDRESS: RAINSLAW

October 19, 1977

Daniel Fusaro, Esq.
Clerk
U.S. Court of Appeals
Second Circuit
U.S. Courthouse
Foley Square, New York 10007

Re: National Labor Relations Board - and - Local 107,
ILGWU -vs- Solboro Knitting Mills, Inc.
Docket No.: 77-4081

Dear Mr. Fusaro:

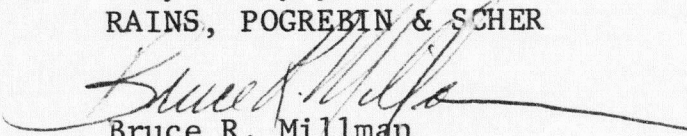
Enclosed please find 25 copies of Respondent's
brief in the above indicated matter, pursuant to the most recent
civil appeal scheduling order in this case.

We are also enclosing a copy of an affidavit of
service of two copies of the within brief upon the attorneys for
each of the other parties in this action.

Would you kindly sign and return the enclosed self-
addressed, stamped postcard to confirm the Court's acceptance
and filing of our brief.

Thank you for your kind cooperation in this matter.

Very truly yours,
RAINS, POGREBIN & SCHER


Bruce R. Millman

BRM:em
Enclosures

